UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Frank LoCascio,

Plaintiff,

v.

United States of America,

Defendant.

No. 00-CV-6015 (ILG)
May 8, 2003

Diarmuid White, Esq., White & White, New York.
Nicolas Bourtin, Esq., Assistant U.S. Attorney.
Dennis P. Riordan, Esq., San Francisco, CA.

MEMORANDUM & ORDER

GLASSER, *District Judge.*

Frank LoCascio has moved this Court, pursuant to 28 U.S.C. § 2255, for an order that would vacate a judgment of conviction entered on June 23, 1992. This is his fifth endeavor to obtain relief since then, preceded by four motions pursuant to Rule 33, Fed.R.Crim.P. in which he sought a new trial. The bases upon which those motions were brought are summarized in this Court's decision in *United States v. Gotti,* 171 F.R.D. 19 (E.D.N.Y. 1997) with which familiarity will be presumed. The bases upon which this motion is brought are: (1) the indictment of Gravano in Arizona in the year 2000 requires the conclusion that the government, in 1992, elicited his testimony implicating LoCascio in the crimes for which he was convicted knowing that his testimony

was false; (2) the government withheld information regarding the true nature of Gravano's plea agreement; and, (3) that he (LoCascio) was deprived of the effective assistance of counsel.

It would, I believe, contribute to an appreciation of what follows, to keep in mind that after a trial the transcript of which exceeds 8,000 pages, at which testimony of upwards of thirty witnesses was presented, and received in evidence were audio cassettes of electronically intercepted conversations, transcripts of which filled seven loose leaf binders which aided the jury while listening to the cassettes, extensive video recordings, photographs and documents. LoCascio was convicted of substantive and conspiracy violations of the RICO Act; conspiracy to murder and the murder of Louis DiBono; conspiracy to murder Gaetano Vastola; conducting illegal gambling businesses; loansharking conspiracy; obstruction of justice: bribery of a public servant and conspiracy to defraud the United States in connection with the collection of John Gotti's taxes.

The first post-trial motion filed by Gotti and LoCascio by one of the "motion attorneys" for them, William M. Kunstler, pursuant to Rule 33, Fed. R. Cr. Pro., the First, Fifth and Sixth Amendments to the United States Constitution and 28 U.S.C. §§ 144 and 145 sought to set aside the jury verdicts; obtain the dismissal of the indictment for prosecutorial misconduct; or, in the alternative, granting them a new trial; recusing this Court from all subsequent proceeding, granting an evidentiary hearing to prove the allegations set forth in Mr. Kunstler's affirmation; and providing

them with names, addresses and telephone numbers of the anonymous trial jurors together with the right to subject to forensic analyses certain documents described in Kunstler's affirmation. In another motion filed simultaneously with the one just described, based upon the same constitutional provisions, they sought an order unsealing portions of the trial transcript relating to *in camera* proceedings affecting certain jurors. Those motions were denied in a Memorandum and Order of 23 pages, dated June 23, 1992, familiarity with which is assumed.

The second motion pursuant to Rule 33 was prompted by redacted copies of two FBI 302 forms which came to the attention of the government which suggested that Gravano participated in particular murders. Based upon those reports, LoCascio asserted that Gravano committed perjury by not disclosing those murders when he testified at the defendant's trial. In a Memorandum and Order dated October 29, 1992, familiarity with which is assumed, that motion was denied.

The third Rule 33 motion is predicated upon another FBI form 302 which prompted Gotti and LoCascio to allege that FBI agents were familiar with information which would have once again established Gravano's trial perjury and was not disclosed in violation of the government's Brady obligation. In a Memorandum and Order dated March 2, 1993, familiarity with which is assumed, that motion was denied.

The fourth Rule 33 motion filed by the defendants rests upon the same claims, namely, that Gravano's testimony at their trial was perjurious. In a 77 page Memorandum and Order dated April 3, 1997, and reported in 171 F.R.D. 19 (E.D.N.Y. 1997) familiarity with which is also assumed, that motion was denied.[1]

I turn now to his latest claims for relief.

A. *The trial testimony of Salvatore Gravano*

Although styled a motion pursuant to 28 U.S.C. § 2255, the petitioner's memorandum would suggest that he seeks reconsideration of this Court's decision denying his motion for a new trial pursuant to Rule 33, Fed. R. Cr. P. in 1997. Referring to that decision and to the proceeding at which

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[1] Gravano's alleged perjury based upon what has come to be known as the "Conte letter" was the subject of precisely the same issue in *United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995). Thomas Gambino was initially a named defendant with Gotti and LoCascio. He was severed and later tried separately. In addressing the perjury claim, the Court wrote: "But we are unpersuaded that any perjury occurred. Gravano had stated under oath in those earlier trials of Gambino organization members that he and the Gambino organization had a principle of not dealing in drugs. Yet, that policy statement is not flatly inconsistent with his having become involved on his own, and John Gotti's behalf in a heroin importation conspiracy. It is at most evidence that Gravano did not adhere to the rules of the organization of which he was a high-ranking member." 59 F.3d at 365. In rejecting a claimed *Brady* violation, the Court wrote: "Proof before the jury that this witness was involved in an abortive conspiracy to import heroin and that he violated the policies of his own organization would scarcely have rendered his gloomy past worse." 59 F.3d at 366.

Gravano was sentenced in which his credibility was commented upon, he then asserts "That ruling must be *revisited* due to the discovery of new information that throws its accuracy into grave doubt." (emphasis added) Memo at 4.[2] If Local Civil Rule 6.3 were to be applied this being a civil proceeding, this motion, regarded as one to reconsider, would be nearly four years too late. The foregoing aside, the motion will be addressed as styled, pursuant to § 2255.

The "New information" is Gravano's indictment on March 2, 2000, in Arizona charging him with trafficking in MDMA ("ecstasy" pills), a controlled substance. From this LoCascio asserts that "Gravano's commission of the crimes for which he is presently under indictment in state court in Phoenix supports the entirely reasonable inference that the jury at LoCascio's trial was seriously misled as to the scope of the benefits Gravano would receive for testifying against LoCascio and Gotti. . . . There is no serious question that Gravano has committed new felonies, ... Yet Eastern District Prosecutors have failed to set aside his plea agreement and to prosecute Gravano for his past crimes, as is their legal right." Memo at 5-6. LoCascio's conclusion then based only upon an indictment, that "there is no serious question" of Gravano's guilt, had it been applied to him upon his indictment, would have obviated the need for his trial with the scrupulous emphasis attendant thereto upon the presumption of innocence and every other due

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[2] "Memo" refers to petitioner's Memorandum in support of his § 2255 motion.

process concern. His contention that the drug crimes charged in the Arizona indictment suggests that his denial of engaging in such crimes prior to testifying in LoCascio's trial more than 8 years ago was false would be unsupportable in logic or in law. See, e.g., *Russell Poling & Co. v. Conners Standard Marine Corp.*, 252 F.2d 167 (2d Cir. 1958) (Inferences or presumptions of fact ordinarily do not run backwards); *W.F. Corbin & Co., v. United States*, 181 F. 296, 304 (6th Cir. 1910) ("But we know of no rule or law which permits us . . . to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously"); *In re Bates' Will*, 152 Misc. 627, 628, 274 N.Y.S. 93, 95 (Sum Ct. K. Co. 1934).

The "reasonableness" of the inference which LoCascio urges to be drawn, namely that the government agreed with Gravano "That future criminality on his part would not endanger his deal for leniency" and "That the failure to reveal that aspect of the plea bargain to the defense or jury constitutes a grave due process violation" is, to put it charitably, questionable. A sentence of imprisonment of 94 years may be imposed if Gravano is convicted in Arizona. Gov't. Memo at p. 12. In addition, and perhaps more significantly and belying the "reasonableness" of his inference, Gravano has been indicted by the government in

this district with conspiracy to possess with intent to distribute MDMA in violation of 21 U.S.C. § 846 with a prospect of imprisonment, if convicted, for a term of 30 years. 21 U.S.C. § 841(b)(1)(C).[3]

LoCascio's assertion that the government's decision not to call Gravano to testify in the prosecution of *United States v. Radonjich*, 92 Cr 159(ILG) was because it believed his anticipated testimony, given twice before,[4] was false is an *ipse dixit*.

B. *LoCascio Redux*

The evidence upon which a jury convicted LoCascio beyond a reasonable doubt is revisited yet again and yet again he persists in his view that "a full and fair review of the government's theory of [his] liability and the evidence it offered to support it at trial will establish that [his] convictions required reliance on Gravano's testimony." Memo at 9.

This Court addressed that view at great length in 171 F.R.D. 19 and if the principle of claim preclusion is to have any meaning at all, the Court should not be required to address it again beyond repeating what it decided then at 171 F.R.D. at 28:

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[3] Gravano was sentenced in this Court to a term of imprisonment of 240 months to be followed by supervised release for life and fined $100,000.

[4] Once in the trial of Gotti and LoCascio and again in the trial of John Pape, the juror compromised by Radonjich, who was subsequently tried and convicted.

> The common thread that runs through this and the prior motions and which is hopelessly misplaced in the overall fabric of this case is that Gravano was the government's key and indispensable witness without whom these defendants [Gotti and LoCascio] could not have been convicted. Conveniently avoided is the fact that prior to and after the severance of Thomas Gambino, Salvatore Gravano was a named defendant in the indictment of this case together with John Gotti and Frank LoCascio and a mere ten weeks or so prior to Gravano's election to cooperate, the government was fully prepared to proceed to trial against all three. Conveniently, and surely deliberately avoided is any reference to the words from their own mouths which convicted them and which Gravano's testimony essentially echoed. The recognition of that unassailable fact was acknowledged with exquisite simplicity by counsel for LoCascio in his opening statement to the jury: "This is a tape case". . . .

Tr. at 1599. The validity of that acknowledgment and the inevitability of their conviction based upon those tapes alone will be made plain by a reading of the words which fell from their mouths and which will be set out as they pertain to the indictment.

The Court then set out at some length the words, captured on tape which, paraded before the jury, inexorably led to their conviction. Those words are to be found on pages 28-33 of 171 F.R.D. which are here incorporated by reference.

Inexplicably, LoCascio writes that "In its 1997 ruling, this Court rested its denial of the Rule 33 motion partially on its conclusion that, 'The inevitability of the [defendants'] conviction based on [the taped evidence] alone' . . . rendered any *Brady* violations which have been committed concerning Gravano and whatever perjury Gravano may have tendered against LoCascio harmless error. The Second Circuit did not discuss or rely on this particular conclusion in its 1998 unpublished order affirming this Court's order."

That assertion compels a revisit of that unpublished order in which the Court reiterates LoCascio's arguments that: (1) the government deliberately suppressed evidence of Gravano's participation in the narcotics conspiracy [with Conte] which could have been used to impeach him at LoCascio's trial; (2) the government compounded its misconduct by having Gravano testify at LoCascio's trial that narcotics activity was not sanctioned by the Gambino family of which LoCascio, Gotti and Gravano were leaders; (3) Gravano misled the jury, with the government's knowledge, by stating that he pleaded guilty to all his crimes but making no mention of the narcotics conspiracy; (4) the government committed further misconduct by arguing in summation that Gravano's credibility was bolstered by his cooperation agreement knowing that he breached that agreement by giving misleading testimony at LoCascio's trial. Following that recital, the Court wrote:

> Judge Glasser carefully considered, and ultimately rejected, each of those contentions in an opinion reported at 171 F.R.D. 19 (1997). although LoCascio attempts to recast some of these arguments before this Court, we are not persuaded that we should disturb Judge Glasser's carefully reasoned holdings on this appeal.

166 F.3d 1202, 1998 WL 870230 at *1 (2d Cir. 1998).

At Mem. 11-12, he reiterates his argument that the Second Circuit's description of the evidence against him is found in its entirety in excerpts culled from that Court's opinion at 6 F.3d at 943-44, 945, the essence of which are (1) that "His conviction was principally grounded on his presence in the Ravenite apartment during discussions of the crimes for which he was convicted;" (2) "[A]s the 'underboss,' LoCascio was present to help evaluate plans presented by Gotti and give advice as needed. . . . Considering the precautions taken to ensure security, and after hearing the tapes of what was discussed in that apartment, the jury was entitled to consider whether it was likely that LoCascio would have been present during those conversations if he were not a participant." Tellingly, he omits the last sentence of that excerpt, which reads "*Although LoCascio's mere presence would not be sufficient to sustain his conviction, the government did far more than establish his presence.*" (emphasis added).

Tellingly too, omitted from his assertion that the foregoing excerpts from the Circuit Court's opinion constitute the "entirety" of that Court's description of the evidence against him, is the Court's view of the evidence presented at trial expressed as follows:

> The government's proof to support the allegations that Gotti and LoCascio had been in command of an extensive criminal enterprise was comprised mostly of lawfully intercepted tape-recorded conversations of the defendants-appellants and other alleged members of the Gambino Family. The government introduced tape recordings from four different locations over an eight-year period.
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> The most significant evidence consisted of conversations intercepted at 247 Mulberry Street in New York during the period from late 1989 until early 1990. The government had installed three listening devices in that building: in the Ravenite Social Club on the first floor, in a hallway behind the club's rear door, and in an apartment two stories above the club ("The Ravenite Apartment"). It was this last location that proved the most fruitful for the government and the most damaging for the defendants. In the discussions in the Ravenite Apartment, Gotti, LoCascio and other Gambino Family members discussed various illegal acts. These discussions formed the core of the proof against the defendants-appellants at trial.

6 F.3d at 930.

In furtherance of his persistent effort to persuade of Gravano's indispensable role in obtaining his conviction, LoCascio culls from the record selected excerpts from the government's closing statements to the jury in which it was suggested that the jury can and should convict on Gravano's testimony alone; that Gravano's testimony makes the proof in the case "absolutely suffocating;" that "He is of enormous value to us as a witness." Mem. at 13. Omitted, however, are those excerpts from the summation which this Court set out in 171 F.R.D. at 48. After referring to the tapes from the Ravenite Social Club, the hallway behind it, and the apartment above it, based upon which Gotti, LoCascio and Gravano were indicted, the government said:

> Until November 1, 1991, that's what we had; that's all we needed. Those tapes convict these defendants. . . .
>
> Tr. at 7352. I suggest to you, ladies and gentlemen, . . . don't for a minute think that I am suggesting to you that you shouldn't be careful in evaluating his [Gravano's] testimony. You should. Salvatore Gravano was a major, major league criminal. You should be careful in assessing his testimony.
>
> Tr. at 7364.

The Court did not, in its opinion of April 3, 1997, make reference to the many other excerpts from the government's summation which belie the defendant's obsessive assertion that Gravano's testimony alone was the basis for his conviction. For example:

> The defendants want you very much, . . . to believe that we made a deal with Salvatore Gravano in order to get John Gotti and Frank LoCascio. Like everything else that is said to you, look to the evidence. The facts show otherwise. We have John Gotti, Salvatore Gravano and Frank LoCascio. We were ready to go without Gravano. . . .
>
> The real significance to Gravano is not this case, because John Gotti opened the window on to this case. There are no new charges based on Gravano. All of those were provable before we had Gravano.
>
> Tr. at 7368. I submit to you, Ladies and Gentlemen, you can and you should convict on the tapes alone.
>
> Tr. at 7369.

LoCascio once again rails against his conviction of the conspiracy to murder and the murder of DiBono; the conspiracy to murder Vastola; of conducting illegal gambling businesses; of the extortionate extensions of credit ("the loan-sharking") conspiracy; the obstruction of justice; of the "tax" conspiracy. That this is yet another attempt to re-litigate that which has been repeatedly denied is clearly (and probably unwittingly) evidenced by his introduction to his "Statement of Facts." viz., "*The Case Against LoCascio Revisited.*" Mem. at 8.

The case against LoCascio was deemed by a unanimous jury to have been proved beyond a reasonable doubt and his conviction was affirmed by the Court of Appeals in an opinion which reflected a meticulous review of the record and a careful consideration of the arguments advanced by the defendants. *United States v. Locascio,* 6 F.3d 924 (2d Cir. 1993). Given that jury verdict, the affirmance of that verdict by the Court of Appeals, the four rejections of his Rule 33 motions, the last of which was in an exhaustive factual and procedural review of the record and of his claims for relief, reported in 171 F.R.D. 19 (E.D.N.Y. 1997) and affirmed in 166 F.3d 1202 (2d Cir. 1998), it is difficult to comprehend his insistent disregard of those determinations. A cursory review of that insistence follows.

The Louis DiBono Charges

"The government's proof as to the DiBono conspiracy . . . consisted of taped evidence that, in LoCascio's presence, Gotti twice said that DiBono would be 'whacked' for not 'coming in' to see him." Mem. at 9.

The Unfulfilled Conspiracy to Murder Corky Vastola

"Viewed most favorably to the government, the trial evidence showed LoCascio attended a meeting on January 24th at which some participants expressed a willingness to assist other parties in exploring whether the conditions necessary for the murder of Vastola . . . could be fulfilled."

* * * * * *

Then he provides this excerpt from the government's response to LoCascio's Rule 29 motion:

> "It is our position legally that Frank LoCascio's presence served the purpose and *that he need not utter one word at all to be part of the conspiracy to kill Corky Vastola.* (emphasis his)." Mem. at 9-10.

Immediately following that statement, but omitted by LoCascio is: "The fact that he does speak, speak in a way that demonstrates both his participation in this plan of how it gets presented and evidences his desire that it happen, further defeats the defendant's motion to dismiss this count, even before it gets to the jury."

Tr. at 6910.

The New York Gambling Operations

"The evidence was uncontradicted that LoCascio received no money and had no involvement in the operation in question." Mem. at 10. The jury acquitted LoCascio of this charge and in doing so manifested an obedience to the Court's instruction to consider each Count as against each defendant separately.

The Connecticut Gambling Operation

"The evidence was undisputed that LoCascio received no money from any gambling operation in Connecticut." Mem. at 10-11.

That the jury convicted LoCascio of this Count proves that the "uncontradicted," "undisputed" evidence established his guilt beyond a reasonable doubt.

He also insists that there was "no evidence" of his participation in a loan-sharking conspiracy and "no evidence" that he "said or did anything to obstruct justice" and that his conviction of tax conspiracy was based "on one short segment of the December 12, 1989 conversation" and upon the government's arguing his conviction on the ground that he was Gotti's underboss. Mem. at 11.

His persistence in advancing his view that there was no evidence to support his conviction of all of the aforementioned crimes can only be characterized as a delusional belief that he was never a defendant in a trial at the conclusion of which he was found guilty beyond a reasonable doubt by a jury he found to be satisfactory and whose finding was deemed to be supported by the evidence by a United States Court of Appeals. His implicit assertion that he was found guilty of the DiBono and Vastola murder conspiracies only because he was merely present at the wrong place at the wrong time continues to ignore the succinctly explicit determination by the Court of Appeals, viz., "LoCascio, however, was not convicted for his mere presence." 6 F.3d at 944.

It is remarkable to read that "According to Gravano, he, Gotti, and LoCascio were members of the Gambino Family Administration," Mem. at 12 suggesting that the only evidence of that fact was merely Gravano's saying so. Blithely ignored is the pronouncement by Gotti that "this is gonna

be a 'Cosa Nostra' till I die." GX 301.1A(T) at 93: that "soon as anything happens to me . . . Sammy is the 'Acting Boss. He's our consigliere'" GX 300.1A(T) at 4; that "You're my fuckin' 'Underboss.' Correct me, Frankie." GX 304.1A(T) at 9. His assertion that "It was Gravano's testimony describing the 'function' of an 'underboss' upon which the government rested its 'functional presence' argument against LoCascio," Mem. at 11-12, ignores the testimony of Special Agent Schiliro who described the structure of an organized crime family and the function of the boss, the underboss and the consigliere, among other things. Tr. at 2006.

LoCascio once again contends that the government violated its *Brady* obligations by not revealing its knowledge that Gravano discussed narcotics trafficking with Pasquale Conte, a Gambino Family captain. He asserts that the rejection of his prior claim in that regard was bottomed upon the Court's assessment of Gravano's credibility, an assessment which, he insists, must be revisited in the light of Gravano's subsequent conviction of drug dealing in this district and in Arizona. Even a cursory reading of this Court's rejection of his previous *Brady* claim would reveal that there isn't a jot or a tittle to suggest that it was induced by this Court's assessment of Gravano's credibility. That reading would plainly reveal that his *Brady* claim was rejected because (1) his claim was not based upon newly discovered evidence, 171 F.R.D. at 47, aff'd. in 166 F.3d 1202, 1998 WL 870230, at *1 (2d Cir. 1998); (2) the allegations on which he relied were "merely cumulative or impeaching" material which do not

warrant the relief he sought, 171 F.R.D. at 52, aff'd. 166 F.3d 1202, 1998 WL 870230, at *2; and (3) the *Brady* rule is not "violated if the defendant or his attorney either knew, or should have known, of the essential facts that would permit critical scrutiny of a witness's testimony. . . . The testimony carefully elicited from Gravano by the government as to the Gambino Family administration's knowledge that certain crews were dealing in drugs, specifically naming Conte's crew as being one of them, was clearly designed to put LoCascio on notice of facts that would have permitted careful scrutiny of Gravano's testimony assuming that as a member of the administration he didn't already have that knowledge." 171 F.R.D. at 51, aff'd. 166 F.3d 1202, 1998 WL 870230, at *2. It is important to note in this regard, that which was already noted in this Court's previous opinion, namely: "The many crimes with which the defendants were charged did not include the violation of drug laws in any respect. Throughout the trial the defendants emphasized that point repeatedly, vociferously objected to any testimony which suggested that the defendants were involved in any drug offense, and requested the Court on more than one occasion to instruct the jury that narcotics trafficking is not one of the issues before them. Tr. at 1991-92, 5375-78, 7325." 171 F.R.D. at 38. One snippet of the direct examination of Gravano speaks eloquently to the disingenuousness of LoCascio's claim:

> Q. Were there crews within the Family that, to your understanding as underboss, were, nevertheless, involved in narcotics trafficking?
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> A. Yes.

Q. Which crews?

Mr. Mitchell [LoCascio's lawyer]: Your Honor, I object to this entire line

THE COURT: Overruled

A. Johnny G's family, *Patsy Conte's crew,* Eddie Lino's crew. Angelo Ruggiero's crew. (emphasis added).

Tr. at 3979-81, 171 F.R.D. at 46-47.

As has been previously observed, the claim that Gravano's testimony about the crimes he committed with LoCascio and Gotti is unworthy of belief because of the crimes he committed without them some eight years later is bad logic and bad law.

LoCascio also claims that Gravano's arrest in 2000 provides a basis for the Court's reconsideration of its prior conclusion that "The contention so vigorously pursued that the government impermissibly vouched for its witness is quite simply neither supported nor supportable by the record." 171 F.R.D. at 48. The record upon which that conclusion was based is to be found there and is incorporated here by reference to it. That conclusion was affirmed by the Court of Appeals which wrote: "Finally, LoCascio asserts that the government engaged in improper bolstering of Gravano through references to his cooperation agreement. We agree with the district court that their contention is 'quite simply neither supported nor supportable by the record.'" 166 F.3d 1202, 1998 WL 870230, at *3 (2d Cir. 1998).

LoCascio makes another attempt to revisit his *Brady* claim by speculating that the government made an undisclosed promise not to prosecute Gravano regardless of any crimes he may commit in the future and such a promise would entitle him to a new trial. The premise upon which that speculation is based is that Gravano had not been prosecuted by the government for the crimes he committed in 2000. That premise proved to be false — Gravano was prosecuted by the government and sentenced for those crimes.

C. *The Ineffective Assistance of Counsel Claim is Time Barred*

(1) Eight years after his conviction, but ostensibly only two years after the Court of Appeals opinion in 1998, LoCascio claims that he first became aware that he was ineffectively represented by counsel. That revelation is derived, he claims, from the following observation by the Circuit Court, affirming this Court's denial of his fourth Rule 33 motion: "It is more probable than not that LoCascio, who together with Gotti and Gravano administered the Gambino Crime Organization, was fully aware of Conte's narcotics trafficking as were Gotti and Gravano. In addition, LoCascio and Gotti conducted a joint defense at trial and we have no reason to believe that they were not sharing all information relevant to their defense. It is evident to us as it was to the district court, that for strategic reasons neither Gotti nor LoCascio sought to examine Gravano on his statements regarding narcotics trafficking." 166 F.3d 1202, 1998 WL 870230, at *1 (2d Cir. 1998).

From that claimed revelation, LoCascio proceeds to interpret the foregoing observation to mean that the Court of Appeals concluded "that it was therefore 'evident' that LoCascio's counsel did not pursue the issue with Gravano because he shared Gotti's 'strategic' reasons for doing so." Mem. at 28. That interpretation subtly conveys the misleading thought that although it may have been in LoCascio's interest to "pursue the issue with Gravano" his counsel forewent the opportunity to do so because it would not have been in Gotti's interest. That it was also in LoCascio's interest not to pursue it was this Court's view at 171 F.R.D. at 51-52, expressed as follows: "It may also be inferred, given the close association between Gotti and LoCascio already known to the jury, that to cross-examine Gravano on the Conte letter and thus reveal Gotti's involvement, to that extent, in drugs, would result in spillover prejudice to LoCascio with which he would have wished to avoid. . . . The strength of that inference is made manifest by the vigorous objections to any mention of drugs repeatedly made by the defendants." (internal citations omitted). The Court of Appeals agreed, writing that "It is evident to us, as it was to the district court, that for strategic reasons neither Gotti nor LoCascio sought to examine Gravano on his statements regarding narcotics trafficking." 166 F.3d 1202, 1998 WL 870230, at *1 (2d Cir. 1998).

The foregoing aside, LoCascio's ineffective assistance of counsel claim is barred as a plain reading of 28 U.S.C. § 2255 would compel. That statute provides as follows in relevant part:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

* * * * * *

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The date on which the *judgment of conviction* became final was on May 2, 1994, when certiorari was denied by the Supreme Court in 511 U.S. 1070, 114 S.Ct. 1646, 128 L.Ed.2d 365 (1994) following the affirmance of the judgment of conviction by the Court of Appeals in 6 F.3d 924 on October 8, 1993. This petition filed almost 6 years after Mary 2, 1994, is clearly untimely under 28 U.S.C. § 2255(1). In *Clay v. United States,* 537 U.S. 522, 123 S.Ct. 1072, 1076, 155 L.Ed.2d 88 (2003) the Court held that in the context of post-conviction relief, "Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." The Supreme Court's denial of certiorari on October 4, 1999, following the denial of his Rule 33 motion was not the date on which his judgment of conviction became final.

This petition is timely, as he recognizes, only if it was filed within one year of "the date on which the facts supporting the claim . . . presented could have been discovered through the exercise of due diligence" pursuant to § 2255(4). If, as he declares, he first discovered that he might have an ineffective assistance claim upon the issuance of the Second Circuit's opinion in *United States v. Gotti* on December 8, 1998, in 166 F.3d 1202, 1998 WL 870230 (2d Cir. 1998), the one year period of limitation began to run then, not on October 4, 1999, when the Supreme Court refused to review it. That LoCascio first became aware of the strictures (if indeed there were any) under which his counsel labored when he read the Second Circuit's opinion on December 8, 1998, defies credulity.

That incredulity is made manifest in a conversation in the apartment above the Ravenite Social Club on November 30, 1989, at which, in LoCascio's presence, Gotti was overheard to say:

> I'm trying to think what's good for the overall picture, Sammy. First thing is this. With these fuckin' lawyers on all these cases like, even for a bail application, they gotta go in there, argue for your client, within certain parameters. Then after that, keep your fuckin' mouth shut. Like these guys, when Barry Slotnick got up on bail, on the bail hearing, "Your Honor, those charges don't pertain to my client.": Sit the fuck down, or I'll knock you down, you cocksucker! "Let the record show that, that's Mister Gotti they're talking about. Not Mister Carneglia.

> Oh, that's Mister LoCascio you're talking about, not Mister Gravano." Sit down, or I'll knock you down, you motherfucker! Talk within certain parameters, and we'll win, we'll win.

GX 303.1A(T)

Not only is his claimed ignorance disingenuous, given "the tenacity with which defense counsel pursued Gravano on his cooperation agreement [and] [his counsel] objected to it being received when offered by the government" Tr. at 3948; the objection by his counsel to the government's eliciting from Gravano testimony about "crews within the [Gambino] Family that . . . were . . . involved in narcotics trafficking," *supra* at p. 314, naming Conte's crew specifically; but also by Gravano's testimony, elicited by the government as follows:

> Q. Was there any discussion, after the indictment in this case, about George Santangelo coming into the case?
>
> A. We considered him as an attorney in this case.
>
> Q. Who considered it?
>
> A. John did.
>
> Q. Was there any discussion as to whom he would represent?
>
> A. No. Me or Frankie.

Q. Did it matter?

A. No.

Q. Why not?

A. It was one defense team anyway. It didn't matter who he presented.

Q. Did he answer to John?

A. Yes.

Tr. at 4304.

"[E]ven the most objective reading of the entire trial record could lead only to the conclusion that there was an implicit, if not an explicit, joint defense attack mounted against the indictment." 171 F.R.D. at 34.

In an opinion reported in 771 F.Supp. 552 (E.D.N.Y. 1991) this Court granted the government's motion to disqualify Gerald Shargel, Bruce Cutler and John Pollok from representing any defendant in this case at trial. Familiarity with that opinion is presumed. Thereafter, the government moved to disqualify George Santangelo from representing Frank LoCascio after his prior counsel David Greenfield, was granted leave to withdraw. That motion was granted in an opinion reported in 782 F.Supp. 737 (E.D.N.Y. 1992), familiarity with which will also be presumed. In that opinion extensive excerpts of intercepted conversations between Gotti and Cutler were set out revealing in exquisite detail "Gotti's insistence upon knowing about and ultimately approving of

all leg al activity in the case not only on his own behalf, but also on behalf of others." 782 F.Supp. at 740. LoCascio's professed ignorance of that insistence in the light of those revelations is not credible.

In the light of the foregoing, the date on which the facts advanced in support of his claim not only could have been discovered, but were surely known even before his trial commenced and is plainly time barred.

Given his knowledge of the control over the legal process that Gotti insisted upon reserving to himself, what explanation can be given for LoCascio's acceptance of it? The answer is to be found, I suggest, in LoCascio's fundamental commitment to loyalty to the Gambino Crime Family and its boss as an immutable prerequisite to membership in that Family. A reflection of that view is to be found in an intercepted conversation on January 4, 1990, in the apartment above the Ravenite Club in which Gotti, Gravano and LoCascio were considering persons to be "made" members of that Family. Gotti was overheard to say: "I'm not trying not to make people (IA) I want guys that done more than killing." LoCascio was then overheard to say: "That's what you want. . . . Somebody that's loyal, faithful and he's there when you need him. . . . That's what you need." GX 300.1A(t) at 2, 20. His undying commitment to loyalty to his boss was expressed with some emotion in his statement to the Court on June 23, 1992, before being sentenced when he said, in part, "if there was more men like John Gotti on this earth, we would have a better country." Tr. at 11.

In the approximately 8 years that have intervened between the conclusion of the trial and the filing of this petition, LoCascio has been represented by highly regarded and very experienced defense lawyers on direct appeal and on his numerous motions. The argument advanced on his behalf in each of those proceedings can leave no doubt that those lawyers were thoroughly familiar with the entire record of the trial. That not even the glimmer of a thought that his trial counsel's failure to cross-examine Gravano on drug dealing (indeed, given his counsel's objecting to the government's eliciting his testimony about drug dealing) was attributable to his ineffective assistance can only be explained because it wasn't, or, as was evident to this Court and the Court of Appeals, the failure to examine Gravano on drug dealing was for strategic reasons.[5]

In sum, even upon the most tenuous albeit unwarranted assumption that his claim has any validity, the facts supporting it could have been discovered through due diligence years before this petition was filed it is, in addition to being meritless, also time barred.

The emphasis upon Cardinale obscures the fact that LoCascio was also vigorously represented at trial by John Mitchell, an able and experienced defense lawyer. Without reviewing the entire 8,000 page record again for the purpose of establishing

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[5] It is of nothing more than passing interest to note that Bruce Cutler, in his recent book, wrote "Tony Cardinale, along with John Mitchell had done an admirable job defending LoCascio as did Al Krieger for John." Cutler, Closing Argument (Crown 2003) at 202.

his significant role on behalf of LoCascio, I would make reference instead only to his presentation of a Rule 29(a) motion for a judgment of acquittal which was a comprehensive review of the evidence and a lucid argument of the law, spread over 24 pages of the transcript. Tr. 6870-6894. His representation of LoCascio in the charge to be given to the jury was marked by a meticulous attention to virtually every word and nuance with a view to achieving a result that would provide every linguistic safeguard for his client. *See* Tr. 7291-7322 and 7712-7744. These few references will serve, it is believed, to provide a cameo picture of the significantly larger role he played in representing LoCascio throughout the trial.

The claim that Cardinale's ineffective assistance should have been apparent by his failure to cross-examine Gravano on drug dealing and by what he now asserts to be his less than effective summation, is also to suggest by implication that Mr. Mitchell silently acquiesced in his ineffectiveness or even aided and abetted it. No such claim is made by LoCascio. A scrupulously objective reading of the transcript of the trial, with a view to assessing Mr. Mitchell's contribution to LoCascio's defense, would compel the conclusion that such an implication would be unwarranted.

(2) In furtherance of the claim of ineffective assistance of counsel, another motion was filed on behalf of the petitioner on October 22, 2002, seeking the following relief: (i) an Emergency Hearing in order to take testimony of a reluctant witness and thereby preserve evidence; (ii) the

sealing of the proceeding to protect the safety of the witness, and (iii) permission to attend the instant motion under 28 U.S.C. § 2255 to vacate his convictions with respect to the defendant's ineffective assistance of counsel claim based upon new information discovered in the past three (3) weeks provided by Anthony Cardinale, Esq.

In support of that motion is a Declaration of Thomas A. Harvey, Esq. which, in substance, states that: (1) Cardinale revealed to him (Harvey) that Gotti threatened to kill him if he individualized the interest of LoCascio at Gotti's expense; (2) As a result of those threats, Cardinale was (a) prevented by Gotti from cross-examining Gravano concerning LoCascio's lack of involvement in the murder of DiBono; (b) threatened to be "taken care of" by Gotti for asking questions solely about LoCascio; (c) forced by Gotti to cross-examine witnesses about facts and charges that involved only Gotti; and (d) was forced by Gotti to concentrate on him during the second part of the summation; (3) Gotti threatened to harm him if he met alone with LoCascio; (4) Cardinale never revealed that information to LoCascio or anyone else, and does so now because Gotti is dead, although the threat has not been completely removed. Notwithstanding the publication of his identity, Cardinale refused to allow his sworn declaration in support of the motion to be submitted out of fear for his welfare and on advice of counsel, but allowed as how he will testify if compelled to do so.

Although no motion was made by prior counsel to be relieved, yet another Notice of Motion was filed on December 6, 2002, by Diarmuid White, Esq., for an order pursuant to Rule 15, Fed. R. Civ. Pr. granting leave to amend his pending motion pursuant to 28 U.S.C. § 2255 and ordering an evidentiary hearing. The amendment he seeks would add the allegations of Cardinale's belated disclosure in support of his ineffective assistant claim. In support of this motion are the Declaration of Thomas A. Hardy summarized above (Ex. A); the Declaration of Dennis P. Riordan, Esq., counsel on the original § 2255 petition (Ex. B), who states in substance that he interviewed Cardinale and asked whether he suffered from a conflict of interest during LoCascio's trial prior to preparing this 2255 motion and Cardinale did not disclose that he did; the Declaration of Frank LoCascio who, acknowledging that he and Gotti "had some issues in common" states that he never agreed that Cardinale, who he retained, could act in Gotti's best interest at his (LoCascio's) expense and was unaware of Gotti's threats to kill Cardinale if he individualized his interests at Gotti's expense. He then repeats the information contained in Harvey's Declaration. (Ex. C).

The government was directed to file its response by January 31, 2003; the petitioner his reply by February 10, 2003, and argument to be heard on February 21, 2003. That schedule was subsequently amended and the government's response was submitted on March 7 and the

petitioner's reply on March 17, 2003. In the interim, each side submitted submissions on the issues of the necessity or propriety of sealing the record which will be addressed hereafter.

The reasons advanced by Cardinale for his silence until now, defy credulity, stating as he does, that notwithstanding Gotti's death, he is still in fear for "his welfare." One is then led to infer that a degree of fear has fallen below a level, finely calibrated by Cardinale, which has now given him the comfort to come forward that he didn't have while Gotti was imprisoned for life.

That observation aside, the bases upon which LoCascio claims entitlement to the relief he seeks are snippets from an extensive trial record in which when cross examining Gravano, Cardinale refers to *my client* when inquiring about the Connecticut and New York gambling counts and when inquiring about the loan-sharking count. (Def. Mem. at 6). He then represents that at the end of that day's proceedings, Cardinale would testify that "Gotti informed him if he said 'my client' again without saying John Gotti, Gotti would have Cardinale 'taken care of' which Cardinale interpreted to mean have him killed." (Def. Mem. at 6-7). Thereafter, he asserts, his cross-examination of Gravano made reference to "my client nor Mr. Gotti" when seeking to induce his testimony that neither was implicated in the crime about which he was being questioned.

It is important to note that a substantial portion of the cross-examination of Gravano related to the conspiracy to murder and the murder of Paul Castellano (Racketeering Act One); the

murder of Thomas Bilotti (Racketeering Act Two); the conspiracy to murder and murder of Robert DiBernardo (Racketeering Act Three and Counts Three and Four); the conspiracy to murder and the murder of Liborio "Louie" Milito (Racketeering Act Four and Counts Five and Six) in each of which John Gotti alone, or John Gotti and Salvatore Gravano are named and in which LoCascio is not.

The snippets of the transcript he extracts to reflect the phrase "my client nor Mr. Gotti" relate to the murder of Joseph Colucci, of an unidentified man and of John Simone, crimes for which neither Gotti nor LoCascio were charged.

The view, so emphatically asserted, that Cardinale advocated more forcefully for Gotti than he did for LoCascio is belied by his summation seventeen days after he was allegedly threatened not to mention "my client" to the exclusion of Gotti. A few excerpts from that summation will suffice:

> "[A]fter sitting through this case representing Frank LoCascio for the past several weeks, I couldn't wait to get up."
>
> Tr. at 7539. "On the evidence that they have presented against my client and against Mr. Gotti, or the lack of evidence — and I say that directly and point to this man because if there's anyone who knows the evidence in this case, or as Frank

LoCascio is concerned, it is him, John Gleeson. He knows this case better than anybody, and he knows the lack of evidence against Frank LoCascio.

Let me tell you something. When I am done, I hope to demonstrate to you that as far as Frank LoCascio is concerned, and as far as the charges against him are concerned, the charges should not even have been brought.

Forget about the fact that the government hasn't proven anything, let alone proven beyond a reasonable doubt the elements of the crime against him."

Tr. at 7541. "The charges should not have even been brought. He shouldn't have been dragged from his home. He shouldn't have been put in jail for 16 months. He shouldn't even be sitting here."

Tr. at 7542. "Of course, there are seven charges against my client. We're going to go through them and I will demonstrate, I submit to you, and again hold me to it, act accordingly, they haven't proven a thing against my client, not one, let alone seven."

Tr. at 7552. They have to prove two, at least two crimes against Frank LoCascio.

Tr. at 7553. Now, . . . Frank LoCascio is charged, in some very, very serious charges, violent crime in aid of racketeering concerning a guy named DiBono. . . .

. . . What did he do? . . . What can he do? Nothing. What did he say? Nothing . . . the government's theory against Frank LoCascio in this regard is that he was somehow an aider and abetter.

They say while he wasn't there and he didn't do anything, he somehow aided and abetted and he's as guilty as somebody who pulled the trigger. That's what they are saying.

Tr. at 7557. When you think about the case and about the charges that the government brought against Frank LoCascio, I want you to think about the issues of presence, presence with knowledge, and think about what he did or what he's supposed to have done, according to the government, what he did.

The case against Frank LoCascio, I see two bookends. On one end is DiBono. The other end is this tax Count.

Tr. at 7558. When you look . . . at that Count [the tax Count], you have to ask yourself a couple of questions. You have to say to yourselves, what did Fran LoCascio do? What was his participation?

Tr. at 7559. And consider it, in fact, when I say the charges [the murder of Louie DiBono] should never have been brought against Frank LoCascio.

The intent of that charge was . . . to put pressure on Frank LoCascio. . . .

What was it about the charge [the DiBono murder] that all of a sudden Frank LoCascio should be charged with it?

Tr. at 7564. Where in this evidence that's been presented in there anything that in any way convinces you beyond a reasonable doubt that Frank LoCascio is guilty of running some gambling operation?

Tr. at 7588. Extortion. Again, I sit here and I have sat next to Frank LoCascio I don't know how long now and I've been waiting for this evidence. He's charged with making extortionate extensions of credit. Where is the evidence? Where is the evidence that he said anything or even, in fact, if he was present when someone else said something about loansharking?

I wish I could get as direct as I am with the DiBono murder, as far as extortion is concerned, but there is no evidence.

Tr. at 7590-91. Now we get to the obstruction of justice Counts.

* * * * * *

But what did Frank LoCascio do?

* * * * * *

What does LoCascio do? He doesn't say a word. Nothing. Zero. Zip.

Tr. at 7591. But here he is, charged, facing very serious charges. No evidence. No evidence.

* * * * * *

But I suggest to you, if you are being fair and honest as to that Count, either the obstruction or the bribery, ask yourself what did Frank LoCascio do?

How did he participate?

How did he endeavor to influence, obstruct or impede justice?

How did he do anything as far as other corrupt sources are concerned?

What did he do?

The answer is nothing.

Tr. at 7592.

His summation thus exposes the baselessness of his allegedly anticipated declaration, arguing as his summation does, the lack of evidence against LoCascio without a reference to or even a mention of Gotti.

For all the reasons advanced the motion is denied. The motion to amend the complaint pursuant to Rule 15, Fed. R. Civ. Pr. is denied for the reasons that it is futile because it is time barred, and without merit in all other respects. The "new evidence" upon which it is based, is not new at all. Gotti's insistence upon controlling the attorneys appearing not only on his behalf,

but on behalf of other members of the organized crime family of which he was the boss, was captured on tape in the starkest terms and was known to LoCascio long before this trial began.

This belated motion is sought to be made pursuant to § 2255(4). That statute provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> * * * * * *
>
> (4) the date on which *the facts* supporting the claim or claims presented could have been discovered through the exercise of *due diligence.* (emphasis added).

A parsing of the statute requires that some attention be paid to four significant words, namely "due diligence" and "the facts." Addressing "due diligence" first, the Court in *Wims v. United States,* 225 F.3d 186 (2d Cir. 2000) provided guidance. In that case, following the imposition of sentence, Wims told his attorney that a reduction of his sentence was "worth pursuing" and he believed that an appeal would be filed. In fact, no appeal was filed. He filed a § 2255 motion seventeen months after his conviction became final, claiming his recent discovery that an appeal was not filed. In considering the applicability of § 2255(4) the Court wrote:

> The proper task in a case such as this one is to determine when a duly diligent person in petitioner's circumstances would have discovered that no appeal had been filed.[4] After that date, petitioner was entitled to further delay . . . so long as he filed his petition within one year of the date in which the discovery would have been made in the exercise of due diligence.[5]

225 F.3d at 190.

I confess to some uncertainty as to the meaning of FN5. It would seem that if the petitioner had already actually discovered the relevant facts, the question of due diligence would be irrelevant. There can be little doubt that LoCascio was completely aware, long before and during the trial, of Gotti's control over counsel and the legal proceedings in which he and members of the Gambino Crime Family were involved as the excerpts on page 317 *supra* make painfully clear. His actual knowledge of that fact makes superfluous a due diligence inquiry and if such an inquiry were to be made, due and reasonable diligence would have discovered the relevant facts much more than a year before this last motion was filed.

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[4] . . . . The statute does not require the maximum feasible diligence, only 'due,' or reasonable diligence.

[5] We need not decide the question of how to apply § 2255(4) when a petitioner's actual discovery of the relevant facts precedes the date on which these would have been discovered through the exercise of due diligence.

Interestingly apposite on all four of the significant words — "due diligence" and "the facts," is *United States v. Pollard,* 161 F.Supp.2d 1 (D.D.C. 2001), the facts in which are here summarized. Pollard pleaded guilty to conspiracy to commit espionage and was sentenced in 1987 to life imprisonment. In 1990, acting through counsel Hamilton Fox, Pollard filed a motion pursuant to § 2255 to withdraw his plea. His motion was denied later that year. He appealed that decision and was represented on that appeal by several eminent counsel, among whom was the current Solicitor General of the United States. The D.C. Circuit affirmed the denial in 1992. Eight years later, in 2000, he filed a second motion pursuant to § 2255(4) for resentencing, claiming a denial of effective assistance of counsel during sentencing and because counsel failed to file a notice of appeal from his conviction and sentence.

At sentencing, Pollard was represented by an attorney named Hibey. He argues that he didn't discover until 2000 that Fox failed to inform him of an ineffective assistance claim he did not raise in his first § 2255 motion because of a self-imposed restraint from criticizing Hibey. The ineffective assistance he learned was the deviation by Hibe y from prevailing professional norms. Pollard admits that he knew Hibey failed to file a notice of appeal years before he filed the present motion, but argues that he didn't know until within the year of filing this motion that under the prevailing professional norms Hibey had a duty to file a notice of appeal.

The Court dismissed the motion finding that Pollard failed to demonstrate that he filed his motion within one year of "'the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.'" The Court based its conclusion upon the following reasons:

> First, paragraph four of § 2255 is only triggered when a defendant discovers facts, not the legal consequences of those facts. This Court does not accept defendant's assertion that the prevailing professional norms of a lawyer are facts, and thus covered by paragraph four. . . . Therefore, the Court rejects defendant's argument that discovery of the prevailing professional norms constitutes facts under paragraph four.
>
> * * * * * *
>
> Section 2255(4) does not postpone the accrual of limitations based on . . . an attorney's belated discovery or realization of the *legal consequences* of known facts. Rather, postponed accrual is in order only if the *facts* themselves supporting a legal claim were undiscoverable in a timely fashion despite due diligence. (emphasis in original).

161 F.Supp.2d at 10.

The court then went on to quote from *Fraser v. United States,* 47 F.Supp.2d 629, 630 (D.Md. 1999) in which that Court pointed out that the clear language of paragraph four does not support Pollard's interpretation of it. The language quoted was:

> If Congress had meant for the timely filing provision of Section 2255 . . . to be tolled because a defendant or his counsel did not appreciate the legal consequences of known facts, it could have — and would have — said so. It did not. Indeed, it is a well-recognized principle in analogous postponed accrual contexts that it is knowledge of facts, not their legal consequences, that causes the statute to start running. *See, e.g., United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979).

The analogy to this case is evident. LoCascio certainly knew of the joint defense and of Gotti's control of counsel many years ago, but claims he didn't know until recently of Cardinale's flagrant deviation from his professional responsibility if the testimony we are told he would give is to be believed and the legal consequences of those known facts, namely, the claimed ineffective assistance of counsel, a claim which this Court also finds the record of the trial does not support.

The Court also found that Pollard failed to exercise due diligence in attempting to discover the facts. Consonant with the observation I made above about the failure of experienced counsel representing LoCascio through four post-conviction motions to discern Cardinale's ineffective assistance,

the Court in Pollard made a similar observation. "Defendant's extensive legal representation undermines his theory that [he was] prevented from discovering those facts and exercising due diligence. Defendant's ... theory does not ring true when defendant was represented by multiple other lawyers. Given the many intervening years since the sentencing of defendant and his extensive legal assistance, the Court finds that the exercise of due diligence would have revealed the facts supporting the claims presented many years before...." 161 F.Supp.2d at 12.

Turning to the petitioner's request previously noted, that this motion and all future proceedings be placed under seal to protect Cardinale from individuals who might attempt to harm him from coming forward with the information he is now revealing, that request is also denied. To begin with, it is difficult to imagine who those other individuals might be. His hearsay willingness to come forward is not embodied in any sworn statement by him, and no hint is given as to the identity of those individuals. Surely, LoCascio's family or friends would not attempt to harm him. Gotti is dead, and it is difficult to imagine why any current member of the Gambino Organized Crime Family, or relative of Gotti, would want to harm him.

Primary reliance for sealing is placed by the petitioner upon *United States v. Cojab*, 996 F.2d 1404 (2d Cir. 1993). *Cojab* provides no support for his request. After an historically-evolved discussion of the reasons for assuring openness of

criminal proceedings, the Court held that "The presumption of openness is defeated only where the possible loss of that guarantee [of public and press access] is supported by carefully articulated findings demonstrating that (1) closure is necessary to safeguard defendant's right to a fair trial, and (2) the order directing closure is narrowly drawn so as to preserve that specific identifiable interest." 996 F.2d at 1408. There is no reason other than a vaguely asserted "fear for his welfare" which even remotely satisfies the first prong. It is also relevant to note that this motion and Cardinale's name were publicized on November 14, 2002, in Capeci's "Ganglandnews.com"; on January 22, 2003 in the New York Post in an article headed "Wiseguy Wants New Trial Over Gotti Threats"; and on January 23, 2003, in Cardinale's hometown newspaper, the Boston Herald, in an article headed "Gotti Threatened Hub Lawyer into Compliance." Sealing this motion, therefore, would no longer serve the purpose it ostensibly would seek to achieve and the request is denied.

The Clerk of Court is directed to unseal the records of this proceeding.

The proliferation of post-trial motions filed by Mr. LoCascio calls to mind the observation of Justice Harlan in *Mackey v. United States,* 401 U.S. 667, 691, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), which is particularly apt. After noting the fundamental importance of finality in the criminal law, he wrote: "Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But

this does not mean that in doing so, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Frank LoCascio,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Docket No. 03-2485

Argued: June 10, 2004 Decided: Jan. 12, 2005

Herald Price Fahringer, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP (Erica T. Dubno, on the brief), New York, New York, for Petitioner-Appellant.

Nicolas Bourtin, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney, on the brief), Brooklyn, New York, for Respondent-Appellee.

Before: WALKER, Chief Judge, WINTER, and JACOBS, Circuit Judges.

WINTER, Circuit Judge.

Frank LoCascio appeals from Judge Glasser's denial of LoCascio's Section 2255 motion for a writ of habeas corpus. Various claims were raised in the district court, but LoCascio argues on appeal only that he was denied the effective assistance

of counsel. This claim is based on an affidavit from one of LoCascio's attorneys stating that LoCascio's trial counsel received death-threats from a co-defendant, John Gotti, warning counsel not to "individualize[ ] the interest of LoCascio at Gotti's expense." The affidavit further states that counsel thereafter conformed his conduct of the trial to Gotti's wishes. The district court held the claim to be procedurally barred and otherwise without merit. We remand for an evidentiary hearing.

BACKGROUND

We assume familiarity with the criminal prosecution and conviction underlying the present matter. *See United States v. Gotti,* 753 F.Supp. 443 (E.D.N.Y. 1990) (bail hearing closed), *reconsideration denied by,* 776 F.Supp. 666 (E.D.N.Y. 1991); 771 F.Supp. 552 (E.D.N.Y. 1991) (defense attorneys disqualified); 777 F.Supp. 224 (E.D.N.Y. 1991) (anonymously selected and sequestered jury ordered); 782 F.Supp. 737 (E.D.N.Y. 1992) (defense attorney disqualified); 784 F.Supp. 1013 (E.D.N.Y. 1992) (motion to identify jurors from previous trials denied); 1992 U.S. Dist. LEXIS 11400 (E.D.N.Y. June 24, 1992) (motion to set aside verdict or grant new trial denied), *aff'd sub nom. United States v. LoCascio,* 6 F.3d 924 (2d Cir. 1993), *cert. denied sub nom. Gotti v. United States,* 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994). Various counsel represented LoCascio and Gotti after their arraignment and before trial. The government successfully moved to disqualify two of Gotti's counsel on the grounds that both were "house counsel" for Gotti and

received "benefactor payments" from him to represent others involved in the charged criminal enterprise, the Gambino crime family. *See Gotti,* 771 F.Supp. at 560.

LoCascio was originally represented by David Greenfield. Later, John Mitchell joined Greenfield as co-counsel for LoCascio. Greenfield sought to withdraw but was not permitted to do so because Mitchell was a partner of James LaRossa, a potential government witness, and, as a result, the district court curtailed Mitchell's ability to conduct cross-examination and address the jury. On January 6, 1992, George Santangelo filed a notice of appearance to act as co-counsel for LoCascio. The district court disqualified Santangelo on the same grounds relied upon in disqualifying Gotti's original counsel. *See Gotti,* 782 F.Supp. at 742-43. In support of its disqualification motions, the government relied upon recorded conversations between Gotti and various lawyers demonstrating Gotti's insistence on orchestrating and controlling all legal representation relating to the case against him, including the representation of co-defendants. *See id.* at 739-43.

On January 27, 1992, Anthony Cardinale appeared as counsel for LoCascio, and Greenfield was finally relieved. Cardinale was a Massachusetts lawyer who practiced principally in the Boston area and had no known affiliation with Gotti or the Gambino crime family. However, Cardinale had represented defendants alleged to be engaged in organized crime.

LoCascio was tried and convicted along with Gotti of the murder of Louis DiBono and numerous other crimes of racketeering by the Gambino family. *See LoCascio,* 6 F.3d at 930. LoCascio was acquitted, however, of one count on which Gotti was found guilty. *Id.* Following this court's affirmance, *id.* at 931, certiorari was denied by the Supreme Court in 1994, *see Gotti,* 511 U.S. at 1070, 114 S.Ct. 1645.

In October 2000, LoCascio filed the instant Section 2255 motion. He was represented by Dennis P. Riordan. The motion alleged, *inter alia,* that LoCascio was not afforded the effective assistance of counsel based on counsel's failure to pursue certain lines of cross-examination allegedly to protect Gotti. Two years later, while the motion was still pending, a motion to amend was filed. The motion was based on the allegations of an affidavit from Thomas Harvey, an attorney who was of counsel to Riordan. The affidavit stated in pertinent part:

> Mr. Cardinale revealed to me that Mr. Gotti threatened to kill him if he individualized the interest of LoCascio at Gotti's expense. As a direct result of Mr. Gotti's threats, Mr. Cardinale, among other things: (i) was prevented by Mr. Gotti from cross-examining Salvatore Gravano concerning Frank LoCascio's lack of involvement in the murder of Louis DiBono, (ii) was threatened to be "taken care of" by Mr. Gotti for asking questions solely about Mr. LoCascio, (iii) was forced by Mr. Gotti to cross-examine witnesses about facts and charges that involved only Mr. Gotti,

(iv) and was forced by Mr. Gotti to concentrate on Mr. Gotti during the second part of the summation. . . .

Mr. Cardinale revealed that after Mr. Gotti learned that Mr. Cardinale met alone with defendant LoCascio, Mr. Gotti stated he would harm Mr. Cardinale if he ever met alone again with Mr. LoCascio. Thereafter, Mr. Cardinale failed to meet with Mr. LoCascio without Mr. Gotti being present. . . .

Mr. Cardinale never revealed the aforementioned facts to anyone, including Mr. Locascio, and the only reason he is coming forward at this time with the information is that Mr. Gotti's death has lessened the threat to his life, although the threat has not been completely removed.

Although Dennis Riordan, Esq. had interviewed Mr. Cardinale concerning the subject whether [sic] he suffered from a conflict of interest during LoCascio's trial prior to the preparation of both the 2255 motion itself and the Reply Memorandum filed on Mr. LoCascio's behalf in February 2001, Mr. Cardinale did not divulge the instant information and this information was not available to Mr. LoCascio or his present counsel, and is critical to the Court's consideration of the defendant's pending claim of deprivation of his constitutional right to conflict-free counsel.

> Mr. Cardinale has declined at this time to allow his declaration in support of this motion to be submitted because he is concerned for his welfare and on advice of his counsel. However, Mr. Cardinale has advised me that if he is compelled to testify, he will testify in accordance with facts in this declaration.

LoCascio also submitted an affidavit stating that Gotti was his co-defendant and that "[a]lthough my co-defendant and I had some issues in common, I at no time agreed that Mr. Cardinale could act in my co-defendant's best interest at my expense." LoCascio's affidavit further stated that: I at no time was advised, or was otherwise aware, that Mr. Gotti had threatened to kill Mr. Cardinale if he individualized my interests at Mr. Gotti's expense and that, as a result, Mr. Cardinale was restrained in cross-examining Salvatore Gravano concerning my lack of involvement in the murder of Louis DiBono, or in asking questions solely about me, and was forced to cross-examine witnesses about facts and charges that involved only Mr. Gotti and to concentrate on Mr. Gotti during the second part of Mr. Cardinale's summation.

The district court denied the motion to amend as time-barred and in the alternative found the underlying ineffective assistance claims raised by the affidavit to be without merit. *LoCascio v. United States,* 267 F.Supp.2d 306, 322, 324 (E.D.N.Y. 2003). The court granted a certificate of appealability. On appeal, LoCascio asks principally for a remand for an evidentiary hearing on his ineffective assistance claim.

DISCUSSION

We "review[ ] factual findings for clear error and questions of law *de novo*." *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000) (internal quotation marks and citation omitted). "The question of whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*." *United States v. Blau*, 159 F.3d 68, 74 (2d Cir. 1998). However, the district court's denial of a motion to amend a Section 2255 motion is reviewed for abuse of discretion. *See Ching v. United States*, 298 F.3d 174, 180 (2d Cir. 2002).

a) *Procedural Bar*

The district court held that LoCascio's ineffective assistance of counsel claim based on the Harvey affidavit was time-barred and therefore denied the motion to amend the Section 2255 petition.

Section 2255 provides that:

> [a] 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> * * * * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(4). Subsection (4) "does not require the maximum feasible diligence, only 'due,' or reasonable, diligence." *Wims v. United States*, 225 F.3d 186, 190 n. 4 (2d Cir. 2000).

The Harvey affidavit stated that Cardinale revealed the threats from Gotti for the first time during the three weeks preceding October 22, 2002 — the date on which the affidavit was signed. Denying the motion to amend as time-barred and therefore futile, the district court found that "the 'new evidence' upon which it is based, is not new at all. Gotti's insistence upon controlling the attorneys appearing not only on his behalf, but on behalf of other members of the organized crime family of which he was the boss, was captured on tape in the starkest terms and was known to LoCascio long before this trial began." *LoCascio*, 267 F.Supp.2d at 322.

Although a close call, the present claim involves more in our view than Gotti's general practice of controlling attorneys — in particular those on his payroll. It also may involve more than the joint defense strategy in the trial, of which LoCascio was aware. The claim here involves allegations that Gotti, without LoCascio's knowledge, interceded directly with trial counsel — who was not from the area or on Gotti's payroll — gained control of LoCascio's defense by threatening to kill counsel, and forbade counsel from meeting alone with LoCascio. Moreover, it is claimed that counsel altered his conduct of the trial in response. There is presently no evidence that LoCascio was aware of the particular death threat alleged, of Gotti's direct orders to counsel,

or of counsel's conduct in response. While these facts are not inconsistent with LoCascio's understanding of Gotti's practices, as alleged they go far beyond the previously available information (on this record) on the extent of Gotti's control of defense tactics during the trial.[1]

Moreover, on the present record, the facts as alleged could not have been discovered earlier through due diligence. The Harvey affidavit states that Cardinale disclosed the threat only after Gotti died because of the reduced danger to Cardinale. Further, the affidavit and an accompanying affidavit of Riordan state that Riordan interviewed Cardinale "concerning the subject whether [sic] he suffered from a conflict of interest during LoCascio's trial prior to the preparation of both the 2255 motion itself and the reply memorandum filed on Mr. LoCascio's

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[1] In this regard, the district court's and the government's reliance on *United States v. Pollard*, 161 F.Supp.2d 1 (D.D.C. 2001), is misplaced. The petitioner in that case, who alleged ineffective assistance of counsel based on his attorney's incompetence, had been aware at all pertinent times of his counsel's shortcomings and had argued that he had "discovered" the relevant facts only when advised of the legal consequences of the attorney's mistakes. *Id.* at 9. The court held the petitioner's claims untimely on the ground that "paragraph four of § 2255 is only triggered when a defendant discovers facts, not the legal consequences of those facts." *Id.* at 10. By contrast, new facts were allegedly discovered in the instant case — i.e., the threats to Cardinale's life, the order to him not to meet alone with LoCascio, and the consequent alteration in counsel's conduct of the trial.

behalf in February of 2001, I did not receive from him at those times any of the information contained in Mr. Harvey's declaration or any other information demonstrating a conflict of interest."

Thus, the requirements of Subsection (4) were met as to the discovery of new facts. The motion to amend the Section 2255 motion with an ineffective assistance of counsel claim based on the new facts was not time-barred,[2] and denial of leave to amend was an abuse of discretion.

b) *Ineffective Assistance of Counsel*

"A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel." *United States v. Schwarz,* 283 F.3d 76, 90 (2d

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[2] LoCascio claims that the district court had an obligation to inquire into Cardinale's conflict because the court was aware that Gotti desired control over attorneys working on Gambino-related cases. The trial court has an obligation to inquire into the facts and circumstances of an attorney's interests either in response to a timely conflict of interest objection, *Holloway v. Arkansas,* 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), or "when it knows or reasonably should know of the possibility of a conflict of interest," *Strouse v. Leonardo,* 928 F.2d 548, 555 (2d Cir. 1991). In fact the district court here disqualified two sets of prior counsel on the government's motion. Both sets of counsel had close ties to Gotti, and the district court found that the attorneys were "house counsel" for the Gambino crime family, which was at that time controlled by Gotti, and that the attorneys received "benefactor payments" from him. In contrast, no evidence suggested Cardinale had any prior contact with Gotti, let alone that he was under Gotti's control. There was thus nothing before the court triggering an obligation to inquire further.

Cir. 2002) (internal quotation marks and citation omitted). Although a defendant is generally required to show prejudice to prevail on an ineffective assistance of counsel claim, "this is not so when counsel is burdened by an actual conflict of interest." *Id.* at 91. Where a defendant shows "(1) an actual conflict of interest that (2) adversely affected his counsel's performance," prejudice is presumed. *Id.; Armienti v. United States,* 234 F.3d 820, 824 (2d Cir. 2000); *see al so Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). There is an actual conflict between lawyer and client "when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Winkler v. Keane,* 7 F.3d 304, 307 (2d Cir. 1993) (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 356 n. 3, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (Marshall, J., concurring in part and dissenting in part)).

To show that such a conflict adversely affected his counsel's performance, LoCascio must establish an "actual lapse in representation" that resulted from the conflict. *Cuyler,* 446 U.S. at 349, 100 S.Ct. 1708. This is a two-part showing. First, LoCascio must demonstrate the existence of some "plausible alternative defense strategy not taken up by counsel." *United States v. Moree,* 220 F.3d 65, 69 (2d Cir. 2000) (internal quotation marks and citations omitted). In this regard LoCascio does not need to show that the alternative defense "would necessarily have been successful." *Id.* (internal quotation marks and citations omitted). It would be sufficient to show that the alternative

strategy "possessed sufficient substance to be [] viable. . . ." *Id.* (internal quotation marks and citations omitted). Second, LoCascio must show "causation" — i.e., that the alternative defense was "inherently in conflict with or not undertaken emphasized the attorney's other loyalties or interests." *Id.* (internal quotations marks and citations omitted). In other words, he must show that "trial counsel chose not to undertake [the alternative strategy] because of his conflict." *Winkler,* 7 F.3d at 309.

On the present record, we believe that an evidentiary hearing needs to be held as to the existence of both the alleged conflict created by the death threat and any resultant lapse in representation reflected by the alleged change in Cardinale's conduct of LoCascio's defense. "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255.

With regard to the existence of a conflict of interest, no one would question that a credible death threat from a co-defendant ordering a lawyer to sacrifice a client's interests constitutes an actual conflict of interest. However, whether a hearing is required on the present record is a very close question. In determining that issue we look "primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing, it would be admissible

proof entitling the petitioner to relief." *Dalli v. United States,* 491 F.2d 758, 760 (2d Cir. 1974). In this regard, "[m]ere generalities or hearsay statements will not normally entitle the applicant to a hearing, since such hearsay would be inadmissible at the hearing itself." *Id.* (internal citations omitted). Rather, "[t]he petitioner must set forth specific facts which he is in a position to establish by competent evidence." *Id.* at 761; *see also Hayden v. United States,* 814 F.2d 888, 892 (2d Cir. 1987) (same); *United States v. Aiello,* 814 F.2d 109, 113 (2d Cir. 1987) (holding that hearing is appropriate when application contains "assertions of fact that a petitioner is in a position to establish by competent evidence").

The allegations in the Harvey affidavit concerning Gotti's orders and death threat to Cardinale are entirely hearsay. Similarly, Cardinale's alleged willingness to appear at an evidentiary hearing under subpoena to confirm those allegations under oath is based on hearsay. We do not ignore the fact that this method of presenting the claim allows the various persons involved to avoid stating under oath any personal knowledge of a material fact regarding Gotti's orders and threats. Moreover, the timing — years after the pertinent events — adds to the difficulty of verification. Ordinarily, we would be inclined not to order a hearing, particularly in light of the puzzling inconsistency between Cardinale's fear of submitting his own affidavit and his conversing with Harvey in a way that seems equally dangerous. However, the allegations here, if credited, involve an attempt to subvert the adversary process in a fundamental and criminal

manner, and we are assured by an officer of the court that trial counsel has made the statements claimed and will provide testimonial evidence in support. We believe, albeit by a narrow margin, that an evidentiary hearing would best clarify whether that subversion was attempted and succeeded.

Therefore, we direct a hearing with regard to whether Gotti threatened Cardinale as claimed by the Harvey affidavit. Cardinale's live testimony is essential to this claim because, as discussed *infra,* the existence of the threat cannot be reliably inferred from Cardinale's conduct of the trial as reflected in the transcript. Therefore, the factual issue of the existence of orders from Gotti based on a death threat turns on Cardinale's testimony and credibility.

If Cardinale's testimony credibly establishes the death threat and accompanying orders from Gotti, the hearing must then turn to the question of whether the threat caused the requisite lapse in representation. *Winkler,* 7 F.3d at 309. LoCascio relies upon various portions of the trial record as demonstrating that Cardinale sacrificed his defense because of Gotti's threat. In particular, LoCascio argues that inferences from the record show Gotti's threat to have occurred on March 11, 1992, after Cardinale's first day of cross-examining the government's main witness. According to LoCascio, Cardinale's representation through the afternoon of March 11 was unaffected by the threats, but starting on March 12 LoCascio's individual defense was sacrificed to serve Gotti's interests. The government argues that the record

as a whole demonstrates that Cardinale's defense of LoCascio was linked to Gotti from the outset as part of an overall joint defense strategy and any non-individuation of LoCascio was an inevitable product of this strategy.

We have examined the record and find nothing in the transcript alone — without supporting credible testimony from Cardinale — that would support an inference of Cardinale's altering his conduct of the trial because of a death threat. The record does indicate that LoCascio and Gotti engaged in a joint defense at trial to which LoCascio agreed. Indeed, both the district court and this court have made findings in this regard. *See United States v. Gotti*, 171 F.R.D. 19, 34 (E.D.N.Y. 1997) (finding that "even the most objective reading of the entire trial record could lead only to the conclusion that there was an implicit, if not an explicit, joint defense attack [by LoCascio and Gotti] mounted against the indictment"); *LoCascio*, 267 F.Supp.2d at 324 (observing that "LoCascio certainly knew of the joint defense"); *United States v. Gotti*, Nos. 97-1228(L), 97-1248, 166 F.3d 1202, 1998 U.S. App. LEXIS 31190, at *4 (2d Cir. Dec. 8, 1998) (explaining that "LoCascio and Gotti conducted a joint defense at trial, and we have no reason to believe that they were not sharing all information relevant to their defense," and describing the "strategic reasons" why "neither Gotti nor LoCascio sought to examine Gravano on his statements regarding narcotics trafficking").

If the death threat and orders to Cardinale are credibly established, therefore, the hearing must also address whether the threat altered Cardinale's conduct of the trial. A defendant of course is free to pursue a joint defense strategy with a co-defendant, and such a strategy does not create a conflict of interest tainting a trial. *See United States v. Kirsh,* 54 F.3d 1062, 1072 (2d Cir. 1995) ("The fact that Joseph and Mara may have decided to pursue a joint defense strategy in which Washburn acted as lead counsel, does not mean that Washburn represented both defendants. Mara failed to show a conflict of interest."). If, independent of the threats, Cardinale's representation followed LoCascio's and Gotti's joint defense strategy and any failure to individuate LoCascio was the result of that strategy, the threats cannot be said to have caused Cardinale to forgo the alternative defense of separating LoCascio from Gotti at trial. *See Winkler v. Keane,* 7 F.3d 304, 309 (2d Cir. 1993) ("[T]rial counsel did not pursue a plea bargain because Winkler rejected this path, not because of trial counsel's [conflict of interest]."). In other words, LoCascio cannot now claim a lapse in representation simply because Gotti may have threatened Cardinale to stick to the plan that LoCascio had already agreed upon. In such a circumstance it would have been LoCascio's direction, not Cardinale's conflict, that avoided the alternative plausible defense. However, why Cardinale did or did not do certain things cannot be determined without hearing his live testimony under oath.

CONCLUSION

For the foregoing reasons, the case is remanded to the district court for an evidentiary hearing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Frank LoCascio,

Petitioner,

v.

United States of America,

Respondent.

MEMORANDUM AND ORDER
No. 00 CV 6015 (ILG)

GLASSER, United States District Judge:

A complete procedural history of this case can be found in 372 F.Supp.2d 304, 307 n. 2 (E.D.N.Y. 2005), familiarity with which is assumed. Briefly, however, this decision is yet another arising from a motion pursuant to 28 U.S.C. § 2255 in which LoCascio claims he was ineffectively assisted by his counsel, Anthony Cardinale, who, he alleges, labored under a conflict of interest. That claim is bottomed upon Cardinale's revelation 8 years after LoCascio's conviction and after John Gotti died that Gotti threatened to kill him if, in representing LoCascio during their joint trial, he individualized LoCascio's interest at Gotti's expense. In a Memorandum and Order reported in 267 F.Supp.2d 306 (E.D.N.Y. 2003), his motion was denied. The Court of Appeals remanded the case for an evidentiary hearing to determine

whether Gotti threatened Cardinale as claimed. *See* 395 F.3d 51 (2d Cir. 2005). The Court prescribed the framework within which that hearing was to be held and what findings must be made as follows:

> To show that such a conflict adversely affected his counsel's performance, LoCascio must establish an 'actual lapse in representation' that resulted from the conflict. . . . This is a two-part showing. *First, LoCascio must demonstrate the existence of some 'plausible alternative strategy not taken up by counsel'. . . . Second, LoCascio must show 'causation' — i.e., that the alternative defense was 'inherently in conflict with or not undertaken emphasized the attorney's other loyalty or interests'. . . . In other words, he must show that 'trial counsel chose not to undertake [the alternative strategy] because of his conflict.'* (citation omitted and emphasis added).

395 F.3d at 56-57.

The evidentiary hearing, wrote the Court, "needs to be held as to the existence of both the alleged conflict created by the death threat and any resultant lapse in representation reflected by the alleged change in Cardinale's conduct of LoCascio's defense." 395 F.3d at 57. And, added the Court:

> If the death threat and orders to Cardinale are credibly established, therefore, the hearing must also address whether the threat altered Cardinale's conduct of the trial. A defendant of course is free to pursue a joint defense strategy with a co-defendant, and such a

> strategy does not create a conflict of interest. . . . If, independent of the threats, Cardinale's representation followed LoCascio's and Gotti's defense strategy and any failure to individuate LoCascio was the result of that strategy, the threats cannot be said to have caused Cardinale to forgo the alternative defense of separating LoCascio from Gotti at trial. (Internal citations omitted.)

395 F.3d at 58.

It is LoCascio's claim that the record justifies the inference that Cardinale was threatened on March 11, 1992, the first day on which Cardinale cross-examined Gravano and on which his representation was unexceptional, but that a reading of the record beginning on March 12th will support his claim that his defense was sacrificed in the interest of Gotti.

A hearing was accordingly held on September 15, 2005, at which Cardinale was the only witness.

Discussion

I begin by emphasizing the first showing the Court of Appeals decided that LoCascio must make, namely, that here existed some "plausible alternative defense strategy not taken up by counsel." One can read the entire transcript of the proceeding at which, as indicated, Cardinale was the only witness, and will not find the slightest suggestion as to what plausible alternative

defense strategy he could have pursued but didn't. The closest approximation to an attempt to meet that first requirement were the following questions and answers on his direct examination:

Q. And I want to ask you now, if I may, just focus your attention on the DiBono, D-i-B-o-n-o, the Dibono murder. Was that one of the charges in the indictment against Mr. LoCascio?

A. It was.

Q. And, also, against Mr. Gotti?

A. Yes.

Q. And did this threat come before you cross-examined him on that subject?

A. I believe so. I would have to go back and look. I believe that we had not gotten into the DiBono aspects with any detail.

Q. As a result —

A. I'm not sure again.

Q. If I may ask you this: As a result of the threat you referred to, did you change your course of cross-examination as far as Mr. DiBono was concerned?

A. In one respect, yes.

Q. Would you tell us what that is?

A. Well, I did not ask certain questions that I would have. Specifically whether or not — in cross-examining Gravano, whether Gravano would agree that he had never had any conversations whatsoever with Frank LoCascio about DiBono and the murder of DiBono, whether or not he — whether it was true that he had never heard Frank LoCascio either before or after the murder of DiBono discuss that event and that he had no personal knowledge of Frank LoCascio's participation in any activities related to a murder regarding Mr. DiBono.

Q. So, if I understand, but for the threat you would have asked those questions, but because of the threat you did not?

A. It is a difficult — it is a difficult situation to say yes or no about that. Those were questions that I had in mind to use, I believed to be safe questions and I did not ask them.

Tr. at 9, 10.

The decision not to ask a question, even if that decision was induced by the alleged threat, can hardly be characterized as an alternative defense strategy which might plausibly have been pursued but wasn't. In that regard, after conceding that he didn't know what answers he would have gotten from Gravano to questions he might have asked on cross examination, the following was elicited on cross-examination:

Q. The point is simply you didn't know what he was going to say in response to questions on cross-examination, correct?

A. No, but I could anticipate what he would say based on what he said on direct or whatever 3500 materials there were.

Q. Is it fair to say if you had asked him whether or not he ever had conversations with Frank LoCascio regarding the murder of Louie DeBono, he might have said that in fact he did have those conversations?

* * *

A. I believe that based on his direct examination, 3500 materials, that if such evidence existed Mr. Gleeson or one of the other prosecutors would have brought that out and I believed it to be a fair closed-end question. In fact, he had no discussions whatsoever. That was my conclusion, if you will.

Q. It is possible he might have said that he did have conversations?

A. I guess anything is possible. So, to answer your questions, anything is possible, sure.

Q. And he also might have —

A. I didn't think it was probable.

Q. It is also fair to say he might have had some knowledge of Mr. LoCascio's involvement in that; isn't that correct?

A. Again, and I'm not trying to do anything other than answer your question, based again on his direct on that issue and 3500 materials and whatever else we gathered, I believe if he had any information about Frank LoCascio's participation in that event he would have given it on direct and that it was a fair question. Probability was if I asked in a closed-ended way that I would have gotten the answer that I wanted.

Q. But at the same time you accepted there would have been some risk in asking that question; isn't that correct?

A. But I believed the risk to be minimal.

The failure to ask one question in which an adverse risk was embedded, albeit a minimal one, can hardly be said to have foregone "a plausible alternative strategy not taken up by counsel."

The foregoing aside, whether Cardinale did or didn't ask Gravano whether he ever had any conversations with LoCascio about DiBono and the murder of DiBono; whether he ever heard LoCascio before or after DiBono's murder discuss that event or whether he (Gravano) had personal knowledge of LoCascio's participation in any activities related to the DiBono murder, Tr. at 10, is to ignore the evidence at the trial and the verdict against LoCascio.

The evidence presented at trial, GX 3041.1A(T), responsive to and informative on this issue was a conversation between John Gotti and LoCascio, captured on tape on December 12, 1989. The relevant portion of which was as follows:

> Gotti: I took Sammy's word. Louie DiBono. And I sat with this guy. I saw the papers and everything. He didn't rob nothin? You know why he's dying? He's gonna die because he refused to come in when I called. He didn't do nothing else wrong.
>
> LoCascio: You have that meeting yet?
>
> Gotti: No. Gonna have it tomorrow.
>
> LoCascio: Because at that meeting, I predict he's gonna bring you fifty.
>
> Gotti: But I wouldn't take nothing.
>
> * * *
>
> LoCascio: He's buying it, he's buying lunch.

In his direct testimony, Agent Schiliro of the FBI, explained that conversation, in essence, as referring to a decision that was already made that: DiBono was going to be killed and no amount of money would change it. Tr. of Gotti Trial at 2673-74.

Cardinale was aware of that conversation as the following colloquy makes plain:

Q. They presented evidence in which Mr. LoCascio was captured on tape in that apartment discussing Gambino family business with Mr. Gotti; isn't that correct?

A. That was again their argument, the government's argument.

Q. But they presented those tapes?

A. Yes.

Q. It is not disputed?

A. It is a fact.

Q. They also presented tapes for . . . the family business discussed on those tapes included the dispute regarding Louie DiBono; isn't that correct?

A. Again, I'm not going to characterize it as family business. There was a tape in which the . . . part of the conversation dealt with Mr. DiBono, yes.

Tr. at 24.

That Cardinale understood the significance of that conversation is underscored by the following interchange during his cross-examination at this hearing:

Q. . . . it is true, is it not, that the whole theory of the government's case was that Gotti, LoCascio and Gravano functioned as an administration of an organized crime family, isn't that correct?

A. That was the theory, yes, sir.

Q. They plotted and committed murders together, correct?

A. Yes, that's their theory.

Q. It was also the government's theory it was Mr. LoCascio's role in that administration that made him guilty of the charges against him?

A. Essentially, yes.

Tr. at 37-38.

And more pointedly, his understanding is reflected in his summation when he said:

As far as Frank LoCascio is concerned, he happens to be present a couple of times when there's conversations with a good friend. That is about it.

Gotti Tr. at 7557.

Among the arguments raised by LoCascio on appeal from his conviction was that his culpability regarding the DiBono murder was presumed by his "mere presence" and by his "mere exposure" to conversations in which criminal conduct was discussed, to which the Court of Appeals responded in 6 F.3d 924, 943-45, as follows:

LoCascio was convicted for crimes stemming from his role as "underboss" of the Gambino Crime Family. The government established at trial that LoCascio's function as underboss

> was to advise Gotti in the formulation for plans for the Gambino Family's criminal activities. His conviction was principally grounded on his presence in the Ravenite Apartment during discussions about the crimes for which he was convicted, even though he did not personally discuss many of the crimes.
>
> * * *
>
> LoCascio, however, was not convicted for his mere presence. There is a distinction between "mere presence" and "presence under a particular set of circumstances" that indicates participation.
>
> * * *
>
> Although LoCascio's mere presence would not be sufficient to sustain his conviction, the government did far more than establish mere presence.

As the foregoing makes evident, whether Cardinale did or did not ask Gravano the questions he hypothesized, LoCascio's conviction would not have been affected at all.

Not only was there a failure to demonstrate the existence of some plausible defense strategy, there isn't a jot or a tittle to demonstrate "causation," i.e., that this chimerical alternate defense conflicted with Cardinale's other loyalty or interest.

Tellingly, in response to the question whether he was caused to forego an alternative defense strategy that he believed would have resulted in LoCascio's acquittal, he responded:

> . . . sitting here today and saying I made conscious decisions back in, you know, 1992, during the course of that trial to do things to hurt Frank LoCascio, *I can't say that.*

Tr. at 48 (emphasis added.)

"A defendant of course is free to pursue a joint defense strategy with a co-defendant and such a strategy does not create a conflict of interest." 395 F.3d at 58, *supra.* That LoCascio and Gotti were pursuing a joint defense strategy was apparent to the Court of Appeals writing in *United States v. Gotti,* 166 F.3d 1202, 1998 WL 870230, *1 (2d Cir. 1998): "In addition, LoCascio and Gotti conducted a joint defense at trial, and we have no reason to believe that they were not sharing all information relevant to their defense." That strategy was also acknowledged by Cardinale at this hearing, viz:

> "When I got into the case, I believed, and again this is without any conversations with Mr. LoCascio, that it was a joint defense and that that was the way it was going to be presented."

Tr. at 20.

> Q. You never discussed with him [co-counsel John Mitchell] pursuing anything other than a joint defense strategy; isn't that correct?

A. That's correct.

Q. That option was never on the table?

A. Never discussed.

Q. Never discussed?

A. Again, I assumed it to be a joint defense.

Tr. at 27.

Cardinale acknowledged the presentation at their trial of tape recorded conversations between Gotti and LoCascio, surveillance photographs and videos showing Gotti and LoCascio together and evidence that Gotti and LoCascio were two of the three members of the Gambino Family administration. Given all that evidence, Cardinale also conceded that as a defense lawyer it would have been difficult to pursue a defense that denied their association. Tr. at 25-26.

The Summation

LoCascio contends that Cardinale's summation supports his claim of ineffective assistance. That claim is based upon this direct testimony of Cardinale, which is hardly compelling.

Q. Do you recall giving your summation in the LoCascio, Gotti trial?

A. I do.

Q. And do you recall a recess being called in the midst of your summation?

A. Yes.

Q. And during that recess did Mr. Gotti speak to you?

A. He did.

Q. And do you remember what he said?

A. What he said in essence was that I had spent enough time dealing with Frank and that it was time for me to start defending him in the final argument.

Q. And did you then go back and as a result of that statement did you devote —

* * *

Q. Did you as a result of that, Mr. Cardinale, devote the balance of your summation to Mr. Gotti?

A. I don't know if I would put it that way, but I certainly added parts of the final argument that dealt with charges regarding Mr. Gotti.

Tr. at 12.

A coldly neutral reading of Cardinale's summation as a whole would readily reveal the poverty of this claim. At the very outset of his summation, the words which fell from Cardinale's lips belie his testimony that following a recess he was told by Gotti that he should start defending him in his final argument. This is what he said, pre-recess:

> I make no apologies for what I am doing. I face this task on behalf of my client and on behalf of John Gotti, the only way I know how. Head-on.

Gotti Tr. at 7539.

A recitation of the countless references to the transcript of his summation would unduly burden this opinion and render baseless the claim that he individuated LoCascio at Gotti's expense. The pre-recess recitation of a few will, perhaps, suffice.

> What is happening with these tapes, with these transcripts, with these witnesses, what is happening throughout, and what colors and shapes this prosecution is this overriding, overpowering desire and effort on Mr. Gleeson's part to get John Gotti at any cost, to do whatever it takes to win.

Gotti Tr. at 7540.

> On the evidence that they have presented against my client and against Mr. Gotti, or the lack of evidence — and I say that directly and point at this man, because if there's anyone who knows the evidence in this case, or as far as Frank LoCascio is concerned, the lack of evidence, it is him, John Gleeson. He knows this case better than anybody, and he knows the lack of evidence against Frank LoCascio.

Gotti Tr. at 7541.

> I am here, and I said, I am proud to be here representing these men, because these, on very specific issues, are as phony and as glorified frame kind of charges as you will ever, ever see.

Gotti Tr. at 7542.

> I told you another thing. I told you when it came to a certain tape, a very serious crime is charged against my client and Mr. Gotti, this Vastola conspiracy, that we would play a tape and we would be the ones yelling "fix," only we'll prove it.

Gotti Tr. at 7546.

> But the one aspect that was left out, was not emphasized, I wish to emphasize now, and that is, you can't find anyone guilty — and I am referring to my client, Frank LoCascio, and it applies to Mr. Gotti as well — you cannot find anyone guilty of a racketeering charge in this case unless the government proves that that person has committed, beyond a reasonable doubt, at least two crimes.

Gotti Tr. at 7551-52.

> One thing is also certain, one thing is irrefutable, one thing there can be no dispute on between Mr. Gleeson or the government and myself, and that is, Frank LoCascio and John Gotti committed no crime —

Gotti Tr. at 7556.

> I want to see if by addressing this one count you will get an idea of what has been happening as far as Frank LoCascio is concerned, as far as John Gotti is concerned in the course of this case.

Gotti Tr. at 7559.

> Whatever Gravano, whatever simmering hatred he kept going on with DiBono is another matter, but as far as Mr. Gotti, Mr. LoCascio are concerned, Dibono had no problems by 3/28.

Gotti Tr. at 7571.

See also the Gotti transcripts at pages 7566, 7570, 7574 and 7578, much of which is devoted to the DiBono murder for which both Gotti and LoCascio were charged.

Cardinale's post-recess summation is largely devoted to an attack on Gravano's credibility which Cardinale believed was the key to the government's case, with passing references to the lack of evidence against LoCascio and concluding with:

> But if you'll just live up to the obligations and the sacrifice we've seen you all give us here in this case and if you'll do that if you'll test their case and test it and test it again, Frank LoCascio and John Gotti have nothing to fear because you will have only one verdict, and that will be not guilty.

Gotti Tr. at 7616.

The replication of so many portions of the Gotti transcripts might have been superfluous given this brief excerpt from the hearing of Cardinale's testimony:

> Q. So, it is fair to say, is it not, that throughout your summation, at numerous points after the alleged threats by Mr. Gotti in the middle of the trial, you focused on what you characterized as a complete lack of evidence against your client; isn't that true?
>
> A. In the summation?
>
> Q. Yes.
>
> A. Yes.
>
> Q. And that's exactly what any good defense lawyer representing the interests of his client would do; isn't that fair to say?
>
> A. I guess it is fair to say, yes.

Tr. at 34.

Given the total failure to demonstrate the existence of some plausible alternative defense strategy not taken up by him, and a total failure to demonstrate any lapse in representation of

LoCascio, I will forego discussing the credibility of an alleged threat beyond observing the absence of even a shred of evidence that what was allegedly threatened was death.[1]

The extensive resort to the record of this hearing mandated by the Court of Appeals and to the relevant portions of their joint trial to demonstrate that the threads of this motion are "as thin as the homeopathic soup that was made by boiling the shadow of a pigeon that had been starved to death" *Grosswald v. Schweiker,* 653 F.2d 58, 61 (2d Cir. 1981), clouded the fact that the relief sought was predicated upon the alleged ineffective assistance of counsel.

Obedience to the teachings of *Strickland v. Washington,* 466 U.S. 668 (1984), drives me as well to the conclusion that this motion must be denied. To sustain a claim of ineffective assistance,

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[1] Q. Will you tell us what he said to you and what you said to him?

A. What he said was that if I ever use a question — if I ever used in a question the words "my client" and excluded him he would take care of me, and I knew what that meant.

Q. And what did that mean?

A. I don't know exactly what he had in mind, but I didn't — I took it as a threat.

It is interesting in this regard to note that Cardinale visited Gotti in prison approximately 10 and 15 times between 1992-1998, representing him *pro bono* on appeal and on various post-trial motions notwithstanding his alleged threats during the trial. He perceived no conflict in that because the interests of Gotti and LoCascio were inextricably linked. Tr. at 50-51.

"the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." 466 U.S. 695.

The *Strickland* court taught much more that is particularly relevant to this motion. It taught that the defendant must show that counsel's representation fell below an objective standard of reasonableness, at 687-88; that judicial scrutiny of counsel's performance must be highly deferential and that a fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight; that a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, at 689 and, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

LoCascio has shown none of these. The extensive history of this case during which every conceivable challenge to the unanimous verdict of guilt has been mounted and rejected, see 372 F.Supp.2d 304, 306, n. 2 (E.D.N.Y. 2005), provides substantial

assurance that the proper functioning of the adversarial process has not been undermined and that the trial can be relied on as having produced a just result.

For all of the foregoing reasons, the motion is denied.

SO ORDERED.

Dated: Brooklyn, New York November 16, 2005

S/ _____
I. Leo Glasser

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: December 5, 2006
Decided: January 9, 2007)

Docket No. 05-6761-pr

FRANK LOCASCIO,

Petitioner-Appellant,

– v. –

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

CARDAMONE and STRAUB, *Circuit Judges*,
and KOELTL, *District Judge.*[*]

Appeal from a judgment of the United States District Court for the Southern District of New York (I. Leo Glasser, *Judge*) denying petitioner's amended motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. Because the District Court acted within its permissible discretion in denying petitioner's recusal motion,

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[*] The Honorable John G. Koeltl, United States District Judge for the Southern District of New York, sitting by designation.

and because it properly determined that the alleged death threat to petitioner's counsel was not the cause of any lapse in representation, we affirm the denial of post-conviction relief.

AFFIRMED.

HERALD PRICE FAHRINGER, Fahringer & Dubno — Herald Price Fahringer PLLC (Erica T. Dubno, *on the brief*), New York, NY, *for Petitioner*.

BARBARA UNDERWOOD, Assistant United States Attorney (Thomas Firestone, Assistant United States Attorney, *of counsel*; Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, *on the brief*), New York, NY, for Respondent.

Per Curiam.

Petitioner-Appellant Frank LoCascio appeals from the judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*), denying his amended motion to vacate, set aside or correct his life sentence pursuant to 28 U.S.C. § 2255. The amended motion raised an ineffective assistance of counsel claim, based on allegations that LoCascio's attorney at the criminal trial, Anthony Cardinale, altered his defense strategy after receiving a death threat from LoCascio's co-defendant, John Gotti. We previously remanded the case for an evidentiary hearing so that the District Court could ascertain "the existence of both the alleged conflict created

by the death threat and any resultant lapse in representation reflected by the alleged change in Cardinale's conduct of LoCascio's defense." *LoCascio v. United States*, 395 F.3d 51, 57 (2d Cir. 2005).

In accordance with our instructions, the District Court conducted an evidentiary hearing, at which Cardinale was the sole witness. Based on Cardinale's testimony, and applying the legal standards set forth in our remand order, the District Court denied LoCascio's § 2255 motion. After careful review of the record and due consideration of Petitioner's arguments, we affirm on the basis of the District Court's finding that any failure to individuate LoCascio was the result of the joint defense strategy between LoCascio and Gotti, not Gotti's alleged death threat against Cardinale. *LoCascio v. United States*, No. 00 CV 6015(ILG), 2005 WL 3068363, at *4-5 (E.D.N.Y. Nov. 16, 2005); *see LoCascio*, 395 F.3d at 58. Because the District Court's finding of no causation is sufficient to sustain the judgment, we find it unnecessary to determine whether the questions Cardinale testified he might have asked Sammy Gravano, a government witness, constituted a "'plausible alternative defense not taken up by counsel.'" *LoCascio*, 395 F.3d at 56 (quoting *United States v. Moree*, 220 F.3d 65, 69 (2d Cir. 2000)).[1]

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[1] After concluding that LoCascio had failed to demonstrate a basis for relief based on the alleged actual conflict of interest, in accordance with the remand from this Court, the District Court stated that "[o]bedience to the teachings of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), drives me *as well* to the conclusion that this motion must be denied." *LoCascio*, 2005 WL 3068363,

Following remand, just three days before the evidentiary hearing was scheduled to begin, LoCascio filed a motion to recuse or disqualify Judge Glasser pursuant to 28 U.S.C. §§ 144 and 455. The supporting affidavits, filed by LoCascio and his *habeas* counsel, pointed to the following as evidence of Judge Glasser's alleged personal bias and prejudice: (1) the fact that Judge Glasser held Cardinale in summary contempt during the criminal trial; (2) Judge Glasser's repeated denial of LoCascio's pre-trial, trial, and post-conviction motions, and in particular, his denial of LoCascio's motion to amend the § 2255 petition on the ground that the ineffective assistance of counsel claim was "meritless"; and (3) Judge Glasser's comment to an interviewer that he was not intimidated during the criminal trial. Judge Glasser denied the motion, which LoCascio now challenges on appeal.

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at *7 (emphasis added). The *Strickland* test for ineffectiveness of counsel requires a showing that counsel's performance was objectively unreasonable and prejudiced the client, that is, that there is a reasonable probability that but for counsel's professional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. However, prejudice is presumed where a defendant shows an actual conflict that adversely affected his counsel's performance. *Id.* at 692; *LoCascio*, 396 F.3d at 56. The *Strickland* standard of prejudice therefore did not apply in this case, but it was referred to only after Judge Glasser had already determined that no relief was warranted under the proper standard applicable to an alleged actual conflict of interest. Therefore, the reference to the alternative holding under *Strickland* does not require a remand.

Recusal motions are committed to the sound discretion of the district court, and this Court will reverse a decision denying such a motion only for abuse of discretion. *United States v. Arena*, 180 F.3d 380, 398 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000). We have reviewed the record in light of LoCascio's allegations, and we find his arguments to be wholly without merit. As Judge Glasser explained in his thorough opinion, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *LoCascio v. United States*, 372 F.Supp.2d 304, 315 (E.D.N.Y. 2005); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994). Furthermore, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Judge Glasser's decision to hold Cardinale in contempt in 1992 (which Judge Glasser subsequently vacated), and his rulings on LoCascio's numerous motions over the past fourteen years, *see LoCascio*, 372 F.Supp.2d at 306 n. 2, do not raise even a suspicion of a "deep-seated and unequivocal antagonism that would render fair judgment impossible," *Liteky*, 510 U.S. at 556.[2]

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[2] *See, e.g., United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (affirming judgment of conviction against challenges to the District Court's impanelment of an anonymous sequestered jury, disqualification of defense attorneys, admission of expert testimony on crime families, giving of certain jury instructions on murder and murder conspiracy, refusal to

LoCascio contends that Judge Glasser's comment to an interviewer following the criminal trial manifests his "dismissive attitude about the threat of bombs planted in his chambers[, which] would certainly lead any objective observer to question his ability to disassociate his own personal feelings from those that frightened Anthony Cardinale." LoCascio's argument is based on the following exchange:

> [*Interviewer:*] Did . . . you feel intimidated during the trial?
>
> *Judge Glasser:* No.

We see nothing in Judge Glasser's one-word response that might indicate a "dismissive attitude" about bomb threats, or raise any doubt in the mind of a reasonable person as to his ability to decide the present case fairly. *See United States v. Bayless*, 201 F.3d 116, 126-27 (2d Cir. 2000) (stating that under the objective partiality standard of 28 U.S.C. § 455(a), the Court must determine "the existence of the appearance of impropriety . . . not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law,

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sever LoCascio's trial, and denial of motion for new trial); *United States v. Gotti*, 166 F.3d 1202 (Table), 1998 WL 870230, at *1 (2d Cir. Dec. 8, 1998) (unpublished disposition) (affirming the District Court's denial of a subsequent motion for new trial and stating, "Judge Glasser carefully considered, and ultimately rejected, each of these contentions. . . . Although LoCascio attempts to recast some of these arguments before this court, we are not persuaded that we should disturb any of Judge Glasser's carefully reasoned holdings on this appeal"), *aff'g* 171 F.R.D. 19 (E.D.N.Y. 1997).

and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge" (second alteration in original; internal quotation marks omitted)), *cert. denied,* 529 U.S. 1061 (2000). If anything, Judge Glasser's remark *confirms* his capacity to disassociate his own personal feelings and focus solely on the merits of the case before him.

In his brief to this Court, LoCascio cites another remark as constituting grounds for recusal, specifically, Judge Glasser's comment during a January 2003 scheduling hearing that he may institute disbarment proceedings against Cardinale. LoCascio did not raise this argument in his recusal motion to the District Court. Although we are not required to consider issues raised for the first time on appeal, we do so here to dispel any insinuation of bias or partiality on the part of Judge Glasser. *See Greene v. United States,* 13 F.3d 577, 586 (2d Cir. 1994) (stating that a panel may, in its discretion, consider an issue raised for the first time on appeal "if the elements of the claim were fully set forth and there is no need for additional fact finding"). First, we find that the comment, read in context,[3] cannot

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[3] We excerpt the relevant portion of the transcript below:

> **The Court:** . . . It's a very discrete issue raised by this motion, the issue, permission or what you want to call it to amend the pleading and to conduct some hearing in open court. That's what it's about. I don't know why it should take 90 days to respond to a motion to amend the complaint whether I grant it. I granted [the government's] request for 90 days but when I got [the] letter [from Mr. White, petitioner's counsel], I was compelled to ask myself does the government

reasonably be construed as exhibiting personal animosity towards Cardinale or LoCascio (neither of whom was present), or displaying hostility towards LoCascio's claim. Rather, Judge Glasser was simply noting some issues that might require further consideration, for purposes of setting a briefing schedule on LoCascio's motion. In any event, because the comment revealed neither

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need 90 days? You don't have to review the entire transcript of this trial to respond to this motion.

Mr. Bourtin [Assistant U.S. Attorney]: Not the entire transcript, but certainly some significant portions of it.

The Court: That would be something that you may want to do should a hearing be held, should Mr. White's motion for a hearing be granted. You may want an opportunity to examine the transcript about the cross-examination by Mr. Cardinale for purposes of ascertaining whether there's any merit to the motion and for the purpose of preparing cross-examination. Reading the testimony doesn't take three months to review. There's also a rather interesting issue, I think, Mr. LoCascio is represented by two lawyers at trial, the second one being a very experienced and able lawyer, John Mitchell which may have some bearing upon Mr. LoCascio's — Mr. Cardinale — well, I suppose he's well aware of the fact should he testify to what it is he says he's testifying, there may be some proceeding which would be instituted by me to have him disbarred at the very least but I don't think we need three months to do that.

Mr. Bourtin: We'll respond by whatever date your Honor deems appropriate.

The Court: You have the transcripts. You have the record of that trial. It would seem to me 45 days is more than enough, give you an opportunity to read that cross-examination. . . .

"an opinion that derives from an extrajudicial source" nor "such a high degree of favoritism or antagonism as to make fair judgment impossible," it did not warrant disqualification. *Liteky,* 510 U.S. at 555; *see id.* at 556.

Second, although LoCascio now contends that Judge Glasser's "threat" against Cardinale is indisputable proof of the lingering "friction between these two formidable forces," the record shows that LoCascio did not seek Judge Glasser's recusal at any reasonable time following the January 2003 hearing. As we have made clear, "recusal motions are to be made 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'" *Gil Enters., Inc. v. Delvy,* 79 F.3d 241, 247 (2d Cir. 1996) (quoting *Apple v. Jewish Hosp. & Med. Ctr.,* 829 F.2d 326, 333 (2d Cir. 1987)). There are at least two reasons for this rule: "First, a prompt application affords the district judge an opportunity to assess the merits of the application before taking any further steps that may be inappropriate for the judge to take. Second, *a prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." Id.* (quoting *In re Int'l Bus. Mach. Corp.,* 45 F.3d 641, 643 (2d Cir. 1995)). Here, LoCascio made no mention of the above remark until *after* the District Court had denied his motion to amend and *after* it had denied his § 2255 petition. This protracted and unexplained delay provides yet another reason for rejecting this new ground for relief. *See id.; United States v. Daley,* 564 F.2d 645, 651 (2d Cir. 1977), *cert. denied,* 435

U.S. 933 (1978); *see also Apple,* 829 F.2d at 334 (holding that in determining the untimeliness of a recusal motion, some relevant factors include "whether: (1) the movant has participated in a substantial manner in trial or pre-trial proceedings; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant can demonstrate good cause for delay" (citations omitted)).

In his final argument, LoCascio asserts that Judge Glasser should have referred the recusal motion to a different judge instead of deciding it himself. However, as LoCascio acknowledges in his brief, the mere filing of an affidavit of prejudice does not require referral. *See Apple,* 829 F.2d at 333. "On the contrary, we have held that a judge has an affirmative duty to inquire into the legal sufficiency of such an affidavit and not to disqualify himself unnecessarily, particularly 'where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience.'" *Nat'l Auto Brokers Corp. v. Gen. Motors Corp.,* 572 F.2d 953, 958 (2d Cir. 1978) (quoting *Rosen v. Sugarman,* 357 F.2d 794, 797-98 (2d Cir. 1966)), *cert. denied,* 439 U.S. 1072 (1979). To be legally sufficient, an affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Wolfson v. Palmieri,* 396 F.2d 121, 124 (2d Cir. 1968) (internal quotation marks omitted). For the reasons discussed above, we find that nothing in LoCascio's affidavit even approached

this standard. Accordingly, we conclude that Judge Glasser properly discharged his duty in declining to refer the recusal motion to another judge.

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE NEW YORK 10007

UNITED STATES COURT OF APPEALS
FILED
JUL 10 2007
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Catherine O'Hagan Wolfe
CLERK

Date:

Docket Number:	05-6761-pr
Short Title:	Locascio v. United States of America
DC Docket Number:	00-cv-6015
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable I. Glasser

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of two thousand five.

Frank LoCascio,

Petitioner-Appellant,

v.

USA,

Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Frank LoCascio. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Catherine O'Hagan Wolfe, Clerk

By: /s/

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